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ascertained from the foreman the position of the goods which he was attempting to locate, the salesman adopted a dangerous method.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 714.]

Error to Circuit Court of City of Norfolk.

Action by Thomas B. Hatton against Swift & Co., Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Hughes, Little & Seawell, of Norfolk, for plaintiff in error.

Loyall, Taylor & White and *W. H. Venable*, all of Norfolk, for defendant in error.

MURPHY'S HOTEL, Inc. v. CUDDY'S ADM'R.

Jan. 16, 1919.

[97 S. E. 794.]

1. Carriers (§ 280 (4)*)—Passenger Elevator—"Common Carrier."

—One maintaining a passenger elevator in a hotel or other public building is a "common carrier," and required to exercise the highest degree of care in maintenance and operation of the elevator to prevent injury to passengers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier. For other cases, see 2 Va.-W. Va. Enc. Dig. 701.]

2. Carriers (§ 316 (7)*)—Passenger Elevators—Injury—Presumption.—If injury to passenger is caused by apparatus wholly under control of carrier, and furnished and applied by it, as an elevator, and the accident is such as does not ordinarily occur, if due care is used, there is a presumption of carrier's negligence, which does not, however, arise from mere fact of accident.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 705.]

3. Witnesses (§ 276*)—Calling of Employee as Adverse Witness.—In action against hotel company for death of guest, caught between floor and elevator, court properly permitted operator of elevator to be called by plaintiff as adverse witness, and examined according to rules applicable to examination and contradiction of such a witness, under Code 1904, § 3351; operator having been adverse or hostile, though without adverse interest.

4. Carriers (§ 315 (1)*)—Injury to Elevator Passenger—Evidence—Support by Pleadings.—In action against hotel company for death in elevator accident, declaration alleging that defendant negligently, recklessly, etc., employed person to operate elevator who was in-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

competent, supported expert testimony to show operator's incompetence from lack of proper instruction.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 721.]

5. Appeal and Error (§ 1066*)—Harmless Error—Modification of Instruction.—In action against hotel company for death in elevator accident, insertion in each of plaintiff's instructions of word "constructed" or "construction," in telling jury degree of care required of defendant with respect to elevator, held harmless to defendant, though no negligence in construction was alleged.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 740.]

6. Carriers (§ 318 (1)*)—Presumption from Injury—Rebuttal.—Prima facie presumption of its negligence, which law raises against common carrier from accident of character not ordinarily occurring where due care is used, holds until carrier has introduced satisfactory evidence tending to rebut presumption.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 705.]

7. Trial (§ 253 (7)*)—Direction of Verdict—Partial Statement of Evidence.—Requested instruction, directing verdict for defendant on partial statement of evidence, was properly refused.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 737.]

Error to Circuit Court of City of Richmond.

Action by Cuddy's administrator against Murphy's Hotel, incorporated. To review judgment for plaintiff, defendant brings error. Affirmed.

C. V. Meredith, Jas. H. Price, and Gunn & Mathews, all of Richmond, for plaintiff in error.

Montague & Lamb and F. B. Hutton, of Abingdon, for defendant in error.

WASHINGTON & O. D. RY. *v.* WARNER.

Jan. 16, 1919.

[97 S. E. 799.]

1. Appeal and Error (§ 1002*)—Scope of Review—Findings of Fact.—Under the drastic demurrer to evidence rule, verdict of jury resolves conflict of evidence, and its finding is conclusive upon the court of review.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620; 17 Va.-W. Va. Enc. Dig. 69.]

2. Master and Servant (§ 278 (18)*)—Federal Employers' Liability Act—Negligence—Evidence.—In action under federal Employers'

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.